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Supreme Court of the United States

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

PETITION FOR REHEARING

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Comes now appellant, Frank Eichholz, and under the provisions of Rule 33 of this Court respectfully prays that this cause be reheard and reconsidered for the following reasons:

1. The Court did not rule upon appellant's contention that the statutory district court below was without jurisdiction to entertatin the counterclaim filed by appellee in said cause, and that as a consequence it had no jurisdiction to enter the following order and judgment relating thereto on May 10, 1938 (Transcript page 81):

> " * * * That the defendants are entitled to recover on their counterclaim from the plaintiff on behalf of the State of Missouri certain license fees and other charges accruing during the pendency of this suit and the effective period of the temporary injunction; * * *."

2. The Court seemingly has overlooked the rule of law that, to concede grounds of appellate jurisdiction for one purpose is to afford grounds for the review of all questions

properly raised on appeal, including those which do not in themselves afford grounds for appeal (Hartford Accident and Indemnity Co. vs. Southern Pacific R. R. Co., 273 U. S. 207, 217, 47 S. Ct. 357, 360.

3. The Court seemingly has overlooked the rule of law that questions of jurisdiction (of the subject matter in this case) may be raised at any stage of a proceeding, whether in the trial court, or on appeal, or on appeal from an interlocutory order before final judgment. (Harrison vs. Northern Securities Co., 197 U. S. 244, 287, 25 S. Ct. 493.)

The foregoing considerations were overlooked by the Court in affirming the judgment of the district court of May 10, 1938, without modifying said judgment on a matter upon which the district court had no jurisdiction to render a judgment. It is respectfully submitted that this contention, made in appellant's brief, will be apparent upon further consideration of the record, and that a full review of it will show that the judgment of the district court of May 10, 1938, finally fixed appellant's status as a judgment debtor, and finally adjudicated the **right of recovery** upon the counterclaim, as distinguished from the **amount of recovery**, which was not determined until a latter date.

Petitioner prays, for the reasons herein set forth, that the decree of the Court be vacated and the cause be reheard and reconsidered; or that the opinion be modified to include an adjudication of the matters and things herein referred to.

D. D. McDONALD,
SMITH B. ATWOOD,
Counsel for Appellant.

We certify that the foregoing petition is, in our opinion, well founded in law, and should be granted and is not interposed for delay.

D. D. McDONALD,
SMITH B. ATWOOD,
Counsel.

SUPREME COURT OF THE UNITED STATES

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SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING

In this argument we do not present the question of appellant's right to appeal upon the question alone of the jurisdiction of the statutory district court to entertain the counterclaim in the case. Rather, our argument is postulated upon the proposition that, having admittedly acquired appellate jurisdiction of the cause for the purposes permitted under Section 380, Title 28, U. S. C. A., this court has jurisdiction to review all questions in the case, including those questions which, if standing alone, would afford no ground for invoking appellate jurisdiction. This court has authority to entertain such questions. (Hartford Accident & Indemnity Co., vs. Southern Pacific R. R. Co., 273 U. S. 207, 217, 47 S. Ct. 357, 360.)

Such a question was presented to this court in appellant's brief in presenting the question of the jurisdictiion of the statutory district court to entertain the counterclaim, and the question of the consequent authority to enter an order or decree of any kind thereon, whether the same be interlocutory or final. This court did not pass upon these questions. We think it should have done so. The reason for our contention is that if, as we contend, there was no jurisdiction to entertain the counterclaim below, there was no jurisdiction to make any order concerning it, or to refer it to a special master.

It follows that no judgment of any kind upon the special master's report could be sustained regardless of the finality of the decree of May 10, 1938. The unauthorized assumption of jurisdiction of the statutory court, and the subsequent appointment of a special master constitutes **a final determination of a substantive right of this appellant** which we contend should have been reviewed on this appeal along with a review of his right in equity to the injunction. If we reason correctly,

the entire counterclaim is thus disposed of. If we reason incorrectly, it is admitted we have nothing here for review except that part of the decree of May 10, 1938 denying the injunction.

Our position, then, depends logically upon answers to these questions:

First: Is an unauthorized exercise of jurisdiction subject to attack at any stage of a proceeding where the same appears of record?

Second: Is the jurisdiction of the statutory district court confined to the subject matter that occasioned its convocation?

Third: Does the subject matter of the counterclaim involve an issue necessary to, or separable from, the issue involved in appellant's right to the injunction?

Fourth: Are the answers to the above questions determinable from the transcript of the record in this case?

If the answers to the above questions are favorable to the appellant's contention we believe the court should pass upon his rights thus involved in its opinion. Taking these questions up in their order, we first submit that the right to question an unauthorized exercise of jurisdiction is never waived.

> "The mere decision of the tribunal, however, that it has authority to try and determine a case, when no such power exists in the court, does not give it the power. Its judgment may be questioned anywhere for want of jurisdiction. The jurisdiction of the court can never depend upon its decision of the merits of the case brought before it, but upon its right to determine and hear it at all." (Bailey on Jurisdiction, Vol. 1, Sec. 2.)

> "A judgment which the court had no authority to render must be reversed on appeal, regardless of the manner in which the higher court is informed of the lack of jurisdiction * * * ." (4 C. J. Appeal and Error Sec. 3179.)

Recognition of the principle that questions involving absence of jurisdiction need not await a final determination of the merits of the case gives occasion to the exercise of the extraordinary remedy of writ of prohibition. Whenever

therefore, appellate jurisdiction is otherwise properly invoked, questions of unauthorized exercise of original jurisdiction apparent from the record are properly presented and decided.

Second, it is but academic to say that the jurisdiction of Federal Courts, generally, is limited to those purposes enumerated in the federal constitution, and the statutes enacted pursuant thereto. Likewise, it is academic to say that, unless appellees could have maintained a separate suit on the counterclaim, it could not maintain it as such in this cause. (See Equity Rule 30, " * * * which might be the subject of an independent suit in equity * * * .")

The question therefore, may otherwise be propounded thus: May appellees have maintained a separate suit on the counterclaim before the statutory district court below? As thus propounded the answer appears obviously favorable to appellant's contention that the district court had no jurisdiction.

Furthermore, as indicated in authorities cited in appellant's brief (P. 28-29), the jurisdiction of the statutory district court is limited to the subject matter which is the occasion for its convocation. (Powell vs. U. S. 300 U. S. 276, 289, 57 S. Crt. 470, l. c. 477; Pittsburg vs. West Virginia Ry. Co. vs. U. S., 28 U. S. 479, 488, 50 Sup. Crt. 378, 381.) Such a subject matter in the bill as filed is injunctive relief. The subject matter of the counterclaim is a money demand—strictly an action at law, non-existent at the time the suit was instituted. (See allegation in first paragraph of counterclaim, transcript page 52-53.)

Third, the allegations of the counterclaim itself show clearly that the issues involved therein are distinct and separable from the issues involved in the injunction relief prayed for in the original bill. The one is an equitable cause of action; the other a legal cause of action, if it states a cause of action at all.

Fourth, the want of jurisdiction is apparent from the record. The subject matter which gave the statutory court jurisdiction appears from the allegations of the bill for injunction relief. (Transcript page 1, et seq.) The counterclaim speaks for itself, and shows that it is an action at law for the recovery of money (Transcript page 52-53). As heretofore stated, the allegations of the first paragraph admit that the cause of action did not arise until after the institution of the suit. The record shows that the court assumed jurisdiction

of the counterclaim, and entered a judgment adjudicating adversely upon the substantive rights of appellant (Transcript page 81). We think this was an unauthorized assumption of jurisdiction. That the extent to which appellant's rights were thus adversely affected could not be determined until the filing of the report of the special master, is beside the point. The fact remains that the status of appellant as a judgment debtor in some amount was fixed by the judgment of May 10, 1938 (appearing on page 81 of the Transcript). The judgment was to that extent void for want of jurisdiction.

We respectfully submit that this court has authority to so rule by virtue of its appellate jurisdiction obtained under Sec. 380, Title 28, U. S. C. A. The time having expired within which to appeal from the judgment on the counterclaim, we believe the court should rule on these questions in order that the rights of appellant in this respect may be preserved.

Respectfully submitted,

D. D. McDONALD,
SMITH B. ATWOOD,
Counsel for Appellant.

P. 3,

UPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1938.

Frank Eichholz, Appellant, *vs.* Public Service Commission of the State of Missouri et al.	Appeal from the District Court of the United States for the Western District of Missouri.

[February 27, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This is an appeal from a decree of the District Court, composed of three judges, holding valid an order of the Public Service Commission of Missouri which revoked appellant's permit as an interstate carrier, and denying a permanent injunction restraining the Commission and certain state officers from prosecuting suits against appellant for using the highways of the State in the transportation of property for hire in interstate commerce. 23 F. Supp. 587.

By a supplementary answer, the Public Service Commission pleaded a counterclaim for fees alleged to be due to the State for the use of its highways since the granting of the restraining order which was issued on the institution of the suit. The District Court adjudged the defendants entitled to recover on the counterclaim and appointed a special master to take the necessary accounting. As the decree is not a final one so far as the counterclaim is concerned, the appellees move to dismiss the appeal. The motion is denied. The decree denied a permanent injunction and this Court has jurisdiction of a direct appeal from that part of the decree by virtue of the express provision of the statute. Judicial Code, sec. 266; 28 U. S. C. 380. Compare *Public Service Commission* v. *Brashear Freight Lines*, decided February 13, 1939. See *Smith* v. *Wilson*, 273 U. S. 388, 390, 391; *Stratton* v. *St. Louis Southwestern Railway Co.* 282 U. S. 10, 14.

Since 1931 appellant, Frank Eichholz, has operated freight trucks in interstate commerce between the States of Missouri, Iowa and Kansas and has maintained terminal facilities in St. Louis, Missouri, Kansas City, Kansas, and other places in Kansas and Iowa.

Prior to the passage of the Federal Motor Carrier Act of 1935 (49 U. S. C. 301 *et seq.*), he obtained a permit from the Public Service Commission of Missouri "to operate as a freight carrying motor carrier over an irregular route" between points in Missouri and points beyond that State, "exclusively in interstate commerce". He did not seek or obtain from the Commission an intrastate permit.

On the passage of the federal act, appellant applied for a permit from the Interstate Commerce Commission and that application was still pending at the time of the hearing below and argument here.

When the state permit was granted, and thereafter, there was in force Rule No. 44 of the Public Service Commission which provided as follows:

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri".

In December, 1936, after hearing, the Commission revoked appellant's permit, holding this rule to have been violated. Its decision was based upon a finding that appellant had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business; that as a subterfuge he had hauled freight originating in St. Louis, Missouri, and destined to Kansas City, Missouri, and *vice versa*, through his terminal in Kansas City, Kansas, which was located less than one-half mile from the Missouri state line. The Commission stated that the testimony showed an industrious solicitation by appellant for the transportation of freight between St. Louis, Missouri and Kansas City, Missouri, on the basis of his quoted interstate rate between such cities as set forth in his tariff filed with the Interstate Commerce Commission, which rate was much lower than the established rate for intrastate carriers operating between these cities, and that by such means a large volume of business had been developed. It appeared that he was

carrying freight at the interstate first-class rate of sixty cents per cwt. between St. Louis, Missouri, and Kansas City, Missouri, through his terminal at Kansas City, Kansas, while the similar intrastate freight rate established by the Public Service Commission between the two cities in Missouri was ninety-two cents per cwt.

On the challenge in this suit of the validity of the Commission's order, the District Court heard the evidence of the parties and found that the carriage of property from St. Louis, Missouri, to Kansas City, Missouri, and thence back into Kansas City, Missouri, for delivery, was not "the normal, regular or usual route" for shipping merchandise between the two cities in Missouri; that the route used by appellant to his terminal at Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise after it had been hauled in the first instance to the terminal; that after reaching the terminal in Kansas City, Kansas, appellant in many instances did not unload the merchandise, that much of such shipments was in carload lots, and that the method employed was to haul the merchandise to his terminal in Kansas City, Kansas, "where a new driver, either with the same tractor and trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri; that in some instances merchandise was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri, but that this was "a negligible percentage of the shipment between Missouri points"; and that the method of operation which appellant employed was designed to afford shippers the benefit of a lower rate and was not in good faith.

First.—By Section 5268(a) of the Missouri Bus and Truck Act (Laws of 1931, pp. 307, 308), the State declared it to be unlawful for any common carrier by motor to furnish service within the State without first having obtained from the Commission a certificate of public convenience and necessity. By Section 5268(b) it was declared unlawful for any motor carrier (with certain exceptions not material here) to use any of the public highways of the State in interstate commerce without first having obtained a permit from the Commission. It was provided that in determining whether such a permit should be issued, the Commission should give consideration "to the kind and character of vehicles permitted over

said highway" and should require the filing "of a liability insurance policy or bond" in such sum and upon such conditions as the Commission might deem necessary to protect adequately the interest of the public in the use of the highway. The statute also authorized the Public Service Commission to prescribe regulations governing motor carriers.

Appellant's complaint did not attack these statutes; on the contrary he asserted that he had fully complied with their provisions. His complaint was of the order of the Commission revoking his permit. We confine ourselves to the question thus presented.

Second.—When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded. *Welch Company* v. *New Hampshire,* decided January 30, 1939; compare *McDonald* v. *Thompson,* decided December 5, 1938.

Third.—Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question. *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Morris* v. *Duby,* 274 U. S. 135, 143; *Clark* v. *Poor,* 274 U. S. 554, 556, 557; *South Carolina Department* v. *Barnwell Brothers,* 303 U. S. 177, 189; compare *Buck* v. *Kuykendall,* 267 U. S. 307, 315; *Interstate Busses Corporation* v. *Holyoke Railway Co.,* 273 U. S. 45, 51; *Sprout* v. *South Bend,* 277 U. S. 160, 169.

Rule 44 was plainly designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic. The rule simply sought to hold to his choice the one who had sought and obtained a permit exclusively for interstate transportation. Appellant was entirely free to conduct that transportation if he did not engage in the intrastate business for which he had deliberately refrained from qualifying himself. We cannot see that the rule on its face imposed any improper burden upon interstate commerce and the question is

ether it did so through the application that the Commission
made of it.

Appellant insists that the hauling from St. Louis over the state
e to Kansas City, Kansas, of merchandise consigned to persons
Kansas City, Missouri, and hauling it back again to its intended
tination in Kansas City, Missouri, was actually interstate trans-
rtation. *Hanley* v. *Kansas City Southern Railway Company*,
7 U. S. 617; *Western Union Telegraph Co.* v. *Speight*, 254 U. S.
; *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404. That fact,
wever, does not require the conclusion that the State's action for
e protection of its intrastate commerce was invalid. See *Lone
ar Gas Company* v. *Texas*, 304 U. S. 224, 238. We may assume
at Congress could regulate interstate transportation of the sort
re in question, whatever the motive of those engaging in it. But
the absence of the exercise of federal authority, and in the light
local exigencies, the State is free to act in order to protect its
gitimate interests even though interstate commerce is directly
ffected. *Cooley* v. *Board of Wardens*, 12 How. 299, 319; *Morgan's
. S. Co.* v. *Louisiana*, 118 U. S. 455; *Smith* v. *Alabama*, 124 U. S.
65; *Kelly* v. *Washington*, 302 U. S. 1, 9, 10. If appellant's haul-
ng of the merchandise in question across the state line was not in
ood faith but was a mere subterfuge to evade the State's require-
ment as to intrastate commerce, there is no ground for saying that
he prohibition of the use of the interstate permit to cover such
transactions, and the application of the Commission's rule pro-
hibiting them in the absence of an intrastate certificate, was an un-
warrantable intrusion into the federal field or the subjection of
interstate commerce to any unlawful restraint. And if the pro-
hibition of such transactions was valid, the Commission was un-
doubtedly entitled to enforce it by revoking appellant's permit for
breach of the condition upon which it was issued and accepted by
appellant.

Fourth.—The ultimate question is thus one of fact, whether the transactions of appellant were of the character described by the Commission and in the findings of the District Court.

The transcript of the record before the Commission was introduced before the court, but neither that evidence nor the additional evidence taken by the court is presented *in extenso* by the record here. The parties properly filed, in connection with this appeal,

condensed statements of the evidence upon which they respectively relied. An examination of these statements discloses no reason for disturbing the court's findings.

Appellant stresses the fact that he had selected his terminal in Kansas City, Kansas, at the beginning of his operations as a motor carrier, about 1932, and that it was a convenient and proper location. But that fact does not alter the nature of the transactions under review. There was a variance in the testimony as to the extent of the appellant's business which was conducted in violation of his permit, but there was adequate basis for the court's finding that it was a considerable portion of his operations and justified the action of the Commission.

The decree of the District Court is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.